

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

Date: January 30, 1998

Case No. 95 INA 678

In the Matter of:

MIROSLAV KUCAY,
Employer

on behalf of

HANNA KOWALCZYK,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of HANNA KOWALCZYK (Alien) by MIROSLAV KUCAY (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S.

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.²

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for the permanent employment of the Alien as a Kosher Household Cook³ with the following duties:

Prepare, season, and cook soups, meats, vegetables according to Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of the celebration. Purchase foodstuff and account for the expenses involved.

The Employer specified in the ETA 750A that the Alien was to work a basic 40 hour week without overtime being anticipated. The hours were noted to be from 9:00 a.m. to 6:00 p.m. with a rate of pay of \$12.81 per hour. The Employer later added the following statement to enlarge the representations in the ETA 750A:

Please be advised that we have an opening for a position of Cook Kosher Live-Out. My mother is a senior person and it has become increasingly difficult for her to purchase the foodstuffs and prepare meals with a well balanced and nutritious content which is medically recommended. The opening for Cook Domestic arises from a business necessity of my household. Because of my mother's health condition it is necessary to serve well balanced meals in my household. I am not in a position to do this because I am employed full time. Hiring of Cook Domestic is the only available option to us.

The cook will work in my household in the following work schedule:

1. 8:00 am preparation of breakfast

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

³DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

2. 8:30 am serving breakfast.
3. 9:00 am to 11:00 am purchasing food stuffs in the local markets.
4. 11:00 am to 11:30 am preparation of lunch.
5. 11:30 am to 12:30 am lunch break for the worker.
6. 12:30 pm TO 2:30 pm cooking soups, main entrees making salads and deserts.
7. 2:30 pm to 3:00 pm serving dinner.
8. 3:00 pm to 3:30 pm cleaning the kitchen area
9. 3:30 pm to 3:30 pm (?) Preparation of supper.
10. 3:30pm to 5:00 pm serving supper and cleaning the kitchen area before leaving home, preparation of light snacks for the evening.

At the present time I do not have any US worker in our employment. The cleaning of the house is done by me once a week. In my household food has to be prepared in accordance with the principles of Kosher cuisine.

The Alien's qualifications, as stated in the form ETA 750B, were that she graduated high school, that she was currently in the United States on a B-2 Visa, and that she had worked as a Kosher Cook for a family in the United States for more than two years.

Notice of Findings. The CO's Notice of Findings proposed to deny the application, subject to rebuttal, on grounds that it did not appear that the duties of the position described in ETA 750A constituted the full-time work within the meaning of 20 CFR § 656.3. The CO said the Employer could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full time employment and had been customarily required by the Employer. The CO required Employer to file the following documentation in support of this application:

State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis.

If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, number of guests, the number of meals served, the time and duration of the meal, etc.

Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.

Evidence employer has employed full-time Kosher cooks in the past, i.e., copies of tax and/or social security report forms.

Who will perform the general household maintenance duties, such as cleaning, laundry,

vacuuming, etc.?

Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

The CO also instructed the Employer to file evidence concerning the care to be provided for Employer's child while the parents were absent from the home.⁴

Rebuttal. The Employer's rebuttal said that his household consisted of himself, his wife, sons (ages 4 and 10), and his mother. The Employer works from 8:00 A.M. to 4:00 P.M., and his wife works from 9:00 A.M. to 5:00 P.M. Employer said his mother is "a senior citizen" and that his primary concerns revolve around her dietary needs. The Employer said he, too, requires a specific diet because he has a peptic ulcer disease.

The Employer included in his rebuttal a schedule of the work that the cook would perform that differed in some details from the schedule that was added to the ETA 750A. The rebuttal schedule covered a period of 9:00 to 6:00. During this time each day the cook would prepare and serve breakfast for his wife, mother, and 4 year old son; prepared lunch for all family members that would be eaten at home or taken with them to work or school; prepared dinner that was served to both his sons and his mother after school; prepared and served dinner for him, his wife, and his mother; and prepared and served a late supper for all five members of the family. This is the basic cooking that was to be carried on daily from Monday to Friday. In addition, however, the employee would be required to cook ahead for the weekend. For Saturday this would include breakfast and lunch for the five persons of the household, plus dinner for the household and ten to twenty-five relatives and friends whom they usually invited for observance of the Jewish Sabbath. In addition, the cook would be expected to prepare lunch and dinner for the Sunday meals of the five member household.⁵

The Employer added that he does not employ any other household help, explaining that his mother, who had done the cooking in the past, no longer is able to perform this work because of her deteriorating health. His mother does provide child care when he and his wife are absent.

⁴The CO then noted that an apparently qualified U. S. worker applied and was rejected for this position. In the Final determination, however, the CO concluded that the findings arising from the availability of a U. S. worker were satisfactorily rebutted and were not longer at issue.

⁵Employer's rebuttal included a photocopy of a publication of the U.S. Department of Agriculture, and a photocopy of pages of recipes taken from The Jewish-American Kitchen, both of which were duly noted. AF 69-99, 101-120. The copies of "popu-lar Jewish-American recipes" were apparently submitted for the purpose of illustrating the length of time required for the preparation of meals, but it was unclear as to which of these recipes would actually be used and which of the dishes would be served, given the medical dietary needs of the Employer and his mother. Moreover, the Employer's rebuttal did not include an explanation connec-ting up the publications of the U. S. Department of Agriculture, *Nutritive Value of Foods*, *Food Facts for Older Adults*, and *A Food Guide for the First Five Years* with such medical dietary requirements as the diagnosis stated in AF 123 by Dr. Kosinski and other statements of the Employer might have suggested. As a result, these documents were given little or no weight in considering these issues on appeal.

The work of household maintenance, he said, would continue to be performed by the members of the household.

Final Determination. After considering the Employer's rebuttal, the CO denied certification on grounds that Employer had failed to meet the requirements of 20 CFR Part 656. The CO said it did not appear that the work described in the rebuttal would require eight hours per day for forty hours a week, and that it appears that the position of Cook was created solely for the purpose of qualifying the Alien for a visa as a skilled worker.

Appeal. After the Employer requested a review of the denial of his application, the record was referred to the Board under the Act and regulations.

DISCUSSION

The primary issue on which the CO appears to have decided this application did not include whether or not the Employer's responses to the NOF establish the business necessity of this position, as the CO focused entirely on whether or not a full time position was proven. Consequently, the issue here is whether or not the CO's conclusion that full time employment is not being offered is a reasonable inference from the evidence of record. We think not. The Employer's application for alien employment certification definitively indicated the conditions of employment. 28 U.S.C. § 1746; and see 20 CFR § 656.20(c)(9). The conditions of employment state that forty hours of work are being offered each week at an hourly rate of \$12.48, the adequacy of which is unchallenged by the CO.

There is no evidence to the contrary in the Appellate File, and the CO refused to accept Employer's estimate of the time the cook would take to perform the proposed job duties because it is the CO's opinion that time the Employer assumed the work would require was unrealistic and contradictory. The CO concluded that even if the Employer's version of the amount of the time that would be required for each function was accepted, the total would not be equal to an eight hour day. It follows that this dispute comes down to Employer's asserting that preparation of a particular meal takes a certain amount of time, while the CO disagrees and says that it will take less time to prepare the meal in question. In the absence of supporting evidence the CO's finding that the duties described would not constitute forty hours of work is speculative at best. Consequently, we conclude that the evidence of record does not support the CO's finding that the Employer failed to prove that the position offered is full time employment.

On the other hand, the NOF did raise an unresolved issue as to whether or not the position description requirement of two years of specialized cooking experience in the duties of a Kosher cook. The effect of this job requirement is to eliminate a U. S. applicant who has two years of cooking experience within the meaning of the DOT position description, but no experience in Kosher cooking. As the CO appears to have confused Employer's proof that this position offers full time employment for a forty hour week with the issue of the business necessity of a restrictive job requirement, the Final Determination cannot be construed as having determined this issue

after weighing the evidence in the record as a whole. For this reason, this matter will be remanded to the CO with directions to consider whether Employer's requirement of two years in cooking Kosher foods is unduly restrictive for the reasons discussed above. 20 CFR § 656.21(b)(2)(i)(B). In the event that the CO finds that the Employer's requirement of two years of experience in Kosher cooking is unduly restrictive, the Employer will be required to prove that the hiring of a Cook (Household) (Live-Out), specializing in Kosher cooking under DOT No. 305.281-010 arises from business necessity.

As the CO did not consider whether Employer's requirement of experience in cooking Kosher food is unduly restrictive under 20 CFR § 656.21(b)(2)(i)(B), the following order will enter.⁶

⁶The CO is reminded that gratuitous observations in the NOF and Final Determination should not invite doubt as to the fairness of the CO in deciding this matter. **Yedico International, Inc.**, 87 INA 740 (Sept. 20, 1988)(en banc).

ORDER

The Certifying Officer's decision denying certification under the Act and regulations is hereby set aside and this file is remanded for reconsideration for the reasons hereinabove set forth.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

